(19)

Supreme Court of the United States

October Term, 1943

No. 389

WAYNE M. NEAL; THE LOUISVILLE DRYING MACHINERY COMPANY; and CITRUS PATENTS COMPANY, - - - Petitioners,

versus

STATE OF FLORIDA; THE STATE BOARD OF EDUCATION OF FLORIDA; and THE STATE BOARD OF CONTROL, Respondents.

RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

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RESPONDENTS' BRIEF OPPOSING WRIT OF CERTIORARI

OPINIONS OF THE COURT BELOW

1. The *original* opinion and the *amended* opinions of the Supreme Court of Florida are correctly cited in petitioners' brief in support of their petition.

JURISDICTION

Jurisdiction of this court is invoked by petitioners under Section 237 of the Judicial Code as amended [28 U. S. C., Sec. 344 (b)].

The foregoing statute is the only authority for taking a case to the federal Supreme Court from the highest court of a state, and the right to review the decision of a state court exists only in cases strictly within its terms.

Caperton v. Ballard, 14 Wall. 238, 20 L. Ed. 885; Gorman v. Washington University, 62 S. Ct. 962, 86 L. Ed. 1300.

The burden is upon petitioners to show affirmatively that the United States Supreme Court has jurisdiction.

Memphis Natural Gas Co. v. Beeler, 62 S. Ct. 857, 86 L. Ed. 1090.

We respectfully submit that it affirmatively appears that this court does *not* have jurisdiction to review the foregoing decisions of the Supreme Court of Florida by writ of certiorari because:

(A) The petition herein was not filed in this court within the time prescribed by statute.

(B) The decisions sought to be reviewed are not final judgments or decrees subject to review by this court;

(C) It does not affirmatively appear that any federal statute, ground, question, right or title is involved.

ARGUMENT

(A) The Petition Herein Was Not Filed in This Court Within the Time Prescribed by Statute.

The federal statute [28 U. S. C., Sec. 350] provides that no writ of certiorari intended to bring any judgment or decree before the Supreme Court for review shall be allowed or entertained unless application therefor be duly made within three months after the entry of such judg-

ment or decree. For good cause shown said period of time may be extended not exceeding sixty days by a Justice of the Supreme Court.

The *original* opinion by the Florida Supreme Court (R. 306-10), is dated March 23, 1943. This opinion finally determined the issues between the appellants [Respondents herein] and appellees [petitioners herein].

On April 5, 1943, Louisville Drying Machinery Company and Citrus Patents Company filed with the Supreme Court of Florida their petition for rehearing (R. 310-14). On the following day, April 6, 1943, Wayne M. Neal filed his petition for rehearing (R. 314-31). Both these petitions for rehearing were denied on April 13, 1943 (R. 331). On April 19, 1943, Wayne M. Neal filed his motion for leave to file an extraordinary petition for rehearing (R. 331-38), which application was denied on May 3, 1943 (R. 339). Thereafter Wayne M. Neal took no further steps in the cause and as to him the *original* opinion dated March 23, 1943, became final as of the date his petition for rehearing was denied [April 13, 1943]. Hence more than three months had passed from the date his petition for rehearing was denied and the date [August 12, 1943] when this court first extended the time for filing the petition for writ of certiorari in this court.

Under the decisions of this court the petition of Wayne M. Neal comes too late.

Citizens Bank v. Opperman, 249 U. S. 448, 39 S. Ct. 330, 63 L. Ed. 701;

Rust Land, etc., Co. v. Jackson, 250 U. S. 71, 39 S. Ct. 421, 63 L. Ed. 850;

Morse v. United States, 270 U. S. 151, 46 S. Ct. 241, 70 L. Ed. 518.

On May 14, 1943, Louisville Drying Machinery Co., and Citrus Patents Co., filed their petition (R. 339) asking that the Florida Supreme Court recall its mandate, grant a rehearing in said cause, and modify its opinion so that a decree could be entered dismissing the bill as to Louisville Drying Machinery Co., and doing justice and equity to the defendant Citrus Patents Co. The justice and equity sought in said petition by Citrus Patents Co., related to certain equities between Citrus Patents Co., and Wayne M. Neal as disclosed by the petition (R. 339-40). This petition had nothing to do with the rights of respondents herein as determined by the Florida Supreme Court in its *original* opinion dated March 23, 1943.

The petition for modification of the opinion was granted (R. 341) and the *original* opinion was amended by directing the Chancellor "to enter such decree as justice and equity may require as to Louisville Drying Machinery Company and as affecting it and W. M. Neal and Citrus Patents Company."

Subsequently Louisville Drying Machinery Co., and Citrus Patents Co., filed on June 1, 1943, their application for permission to file an extraordinary petition for rehearing (R. 342-46), which was denied on June 7, 1943 (R. 348).

Thus no petition for rehearing was ever granted by the Supreme Court of Florida for the purpose of changing its *original* opinion dated March 23, 1943, in which the rights of respondents herein were determined by that court. The only petition granted had to do with claims existing between the fellow defendants Wayne M. Neal and Citrus Patents Co., and permitting the Chancellor to dismiss the cause as to Louisville Drying Machinery Co., if equity so required—based on the claim of Louisville Drying Machinery Co., that it had no interest in the patent application.

Therefore, we submit that the time for filing petition for writ of certiorari in this court by the petitioners Citrus Patents and Louisville Drying Machinery Co., began to run as of the date their first petition for rehearing was denied [April 13, 1943]. And the three months period allowed by the statute had expired prior to August 12, 1943, when this court first extended the time for filing petition for writ of certiorari herein.

Cresswell ex rel. Di Pierro v. Tillinghast, 286 U. S. 560, 52 S. Ct. 648, 76 L. Ed. 1293;

Finn v. Railroad Com. of Calif., 286 U. S. 559, 52 S. Ct. 646, 76 L. Ed. 1293.

Under the decisions of this court hereinbefore cited, the petition of Citrus Patents Co., and Louisville Drying Machinery Co., comes too late, especially in view of the fact that the only decision of the Supreme Court of Florida under attack here is the *original* opinion dated March 23, 1943.

(B) **The Decisions Sought to be Reviewed Are Not Final Judgments or Decrees Subject to Review by This Court.**

If the *original* opinion dated March 23, 1943, and the modification thereof dated May 25, 1943, are to be considered as one opinion bearing the latter date, and thus bring the petition herein within the statutory time limit, then we submit that such judgment or decree is not final and complete.

In the Florida Supreme Court there was a plurality of appellees [petitioners here] and the modified opinion of May 25, 1943, failed to dispose of the controversy as to all parties but directed the Chancellor "to enter such decree as justice and equity may require as to Louisville Drying

Machinery Company and as affecting it and W. M. Neal and Citrus Patents Company." Thus there still remained certain further proceedings in the court of original jurisdiction.

Under the decisions of this court such a judgment is not subject to review by the United States Supreme Court.

Meagher v. Minnesota Thresher Mfg. Co., 145 U. S. 608, 12 S. Ct. 876, 36 L. Ed. 834;

National Bank of Rondout v. Smith, 156 U. S. 330, 15 S. Ct. 358, 39 L. Ed. 441;

Bostwick v. Brinkerhoff, 106 U. S. 3;

Rice v. Sanger, 144 U. S. 197;

Patterson v. United States, 15 U. S. 221, 2 Wheat. 221, 4 L. Ed. 224.

(C) **It Does Not Affirmatively Appear That Any Federal Statute, Ground, Question, Right or Title is Involved.**

The Supreme Court has no jurisdiction to review a state court decision unless it appears affirmatively from the record not only that a federal question was presented for decision to highest court of state having jurisdiction, but that its decision of the federal question was necessary to determination of the cause, that the federal question was actually decided, or that judgment as rendered could not have been given without deciding it.

Southwestern Bell Telephone Co. v. State of Oklahoma, 58 S. Ct. 528, 303 U. S. 206, 82 L. Ed. 751.

Assignments of error which involve no federal question cannot be considered.

Central Vermont R. Co. v. White, 238 U. S. 507, 35 S. Ct. 865, 59 L. Ed. 1433.

There are six assignments of error presented in the present petition for writ of certiorari. The first five relate to the Purnell Act and the sixth relates to the Fourteenth Amendment.

(D) **Assignments Relating to the Purnell Act.**

1. Inasmuch as the jurisdiction of this court is invoked under Section 237 of the Judicial Code as amended [28 U. S. C., Sec. 344 (b)] these assignments should be considered in the light of that statute.

The *validity* of the Purnell Act, a statute of the United States, was not and could not have been questioned in this case in the Florida Supreme Court.

No question was presented or decided concerning the validity of any State statute.

No title, right, privilege, or immunity was specially set up or claimed by either party, or passed upon by the Florida Supreme Court, under any statute of the United States.

A study of the opinion of March 23, 1943, will conclusively show that the Florida Supreme Court *did not* hold that respondents herein were entitled to the patent application by virtue of the Purnell Act.

The Florida Supreme Court gave seven incidents *supporting* their conclusion (R. 308). Fully fifty per cent of those enumerated incidents have nothing whatever to do with the Purnell Act. Those incidents relating to the Purnell Act were not of such character as to control the decision of the court. The Purnell Act was not the con-

trolling factor as evidenced by the following language from the opinion (R. 309):

> "The Experiment Station was designed for works of this kind and not as an aid to private enterprise. One of the things most desired at the time was a process by which citrus waste could be utilized. The correspondence and the testimony of all the parties to this transaction shows that this was their understanding and that Dr. Neal was *employed for this purpose.*"

Petitioners' discussion under their first assignment of error fails to disclose any federal question for determination by this court.

2. Under petitioners' discussion of their second assignment of error the following statement is made: "The denial of a Federal right based on an unsupported finding of fact, presents a reviewable question of law." We do not question that as a correct statement of law, however, we do seriously question its applicability here.

What is the federal right denied?

The only federal statute mentioned in the lower court's opinion is the Purnell Act. What rights do petitioners have under that Act? They have none, and as a matter of fact they claim no rights under that Act.

Petitioners' second assignment of error does not even approach a federal question. They have shown no right to question the expenditure of Purnell funds, and of course have no right to question the expenditure of such funds. Sections 3 and 4 of the Purnell Act [43 Stat. 970] prescribe the procedure where such funds are misapplied.

3. It is sufficient answer to petitioners' argument under their third assignment of error to refer the court to

the following quotation from the opinion sought to be reviewed (R. 310):

> "On the question of whether or not Citrus Products Company was a purchaser in due course without notice, it appears that reliance is placed primarily on a conversation they had with the director of the Experiment Station who said in substance that they had nothing more than a gentleman's agreement with Dr. Neal and that if he repudiated that, appellants had no way to enforce it.
>
> "This was a misleading statement but there were plenty of red flags flying to warn appellees. *The contract between the Experiment Station and Dr. Neal was the determinative answer to this question and the record shows that appellees were on notice of this contract.* They were also on notice of the Purnell Act and its purpose. *Either of these factors was sufficient answer to this question* so we do not deem it necessary to labor the opinion with further discussion of the question of notice."

Obviously the court did not base its decision exclusively on the fact that petitioners were on notice of the Purnell Act. It is equally as obvious that the decision would have been the same without this reference to the Purnell Act.

This court has said that where the state court rested its judgment upon a non-federal ground adequate to support it, the existence of a federal question is of no significance.

> Bilby v. Stewart, 246 U. S. 255, 38 S. Ct. 264, 62 L. Ed. 701;
>
> People ex rel. Doyle v. Atwell, 261 U. S. 590, 43 S. Ct. 410, 67 L. Ed. 814.

4. Under their fourth and fifth assignments of error petitioners in effect say that if they cannot obtain the invention in question then it should be owned and held by some federal interest such as the Secretary of Agriculture.

We submit that under these two assignments of error petitioners are attempting to advance arguments which could only be advanced, if at all, by some federal interest, such as the Secretary of Agriculture.

Petitioners must show that enforcement of the questioned judgment would deprive them, not some federal agency, of some right arising under the federal Constitution or statutes.

> Liberty Warehouse Co. v. Burley Tobacco Growers Co-op Marketing Ass'n, 276 U. S. 71, 48 S. Ct. 291, 72 L. Ed. 473.

Grants to the several states such as made by the Purnell Act are considered as trusts imposed in the several states by Act of Congress, and the obligation imposed thereby rests on the good faith of the state and does not attach to the funds themselves. The observance of the conditions of the grant rests only in the sovereign relations of the two governments and may not be questioned by a private party.

> American Emigrant Co. v. Adams County, 100 U. S. 61, 25 L. Ed. 563;
>
> Mills County v. Burlington & M. R. Co., 107 U. S. 557, 2 S. Ct. 654, 27 L. Ed. 578.

We submit that petitioners' fourth and fifth assignments of error are wholly without merit.

(E) **Assignments of Error Relating to Fourteenth Amendment.**

Only the sixth assignment of error relates to the Fourteenth Amendment.

Under this assignment of error petitioners complain that they had no notice of any contract of employment based on the Purnell Act and that notice of such contract was not in issue in the court below.

As we have previously pointed out, the Supreme Court of Florida held that petitioners herein were on notice of the employment contract, and also of the Purnell Act, but notice of either was sufficient. Therefore the court's decision was not based upon notice of the Purnell Act nor was notice of said Act necessary to a determination of the cause.

Petitioners say they had no notice whatever of any contract to invent and that no such contract was in issue. We call the court's attention to the answer of Wayne M. Neal (R. 11), wherein, in answering the bill of complaint, he says:

> "He was not employed to invent methods or processes, and the discovery by this defendant of said process for removing moisture from citrus waste *was not within the scope of his employment.*"

The answer of Louisville Drying sets out (R. 15) that:

> "It admits that the defendant, Wayne M. Neal, was employed as a member of the Research Staff of said Agricultural Experiment Station, in 1935. It is without knowledge as to whether or not the said Wayne M. Neal was named one of the leaders on Florida Agricultural Experiment Station Official Project #239, dealing with the particular phase of animal husbandry designated on project statement as 'The Digestability and Coefficient Value of Dry

> Grapefruit and Dry Orange Refuse', and that the said Wayne M. Neal became interested in the problem of discovering a process of eliminating moisture from citrus wastes, resulting in canning operations, which citrus wastes could be used as livestock feed, while conducting experiments pursuant to said project."

The answer of Citrus Patents Co., contains the same allegation (R. 21).

Thus these matters were in issue and all three petitioners participated in the taking of testimony thereon and based upon such testimony the Supreme Court of Florida (R. 310) said that "there were plenty of red flags flying to warn" them of the employment contract and petitioners' rights thereunder.

This case involves nothing more than the ownership of property—the invention in question; and the decision of a state court, involving nothing more than the ownership of property, with all parties in interest before it, cannot be regarded by the unsuccessful party as a deprivation of property without due process of law, simply because its effect is to deny his claim to own such property. The Fourteenth Amendment did not impair the authority of the states, by their judicial tribunals, and according to their settled usages and established modes of procedure, to determine finally, for the parties before it, controverted questions as to the ownership of property which did not involve any right secured by the federal Constitution, or by any valid Act of Congress, or by any treaty.

> Tracy v. Ginzberg, 205 U. S. 170, 27 S. Ct. 461, 51 L. Ed. 755.

In Florida it is settled practice that where an amendment is allowable, the Supreme Court will give to the party

entitled thereto the same benefit of the amendment as though it had been actually made.

Campbell v. Chaffee, 6 Fla. 724;

Southern Liquor Distributors v. Kaiser, 150 Fla. 52, 7 So. 2d 600.

It is also generally recognized that where the evidence received without objection supports the verdict, the pleadings, if defective, will be considered by an appellate court to have been amended to conform to the proof.

A. Coolot Co. v. L. Kahner & Co., 72 C. C. A. 248, 140 Fed. 836;

Sacramento Suburban Fruit Lands Co. v. Lindquist, 39 Fed. 2d 900, certiorari denied, 51 S. Ct. 31, 282 U. S. 853, 75 L. Ed. 756.

The question of the scope of Neal's employment contract was not, however, one which first came to the attention of petitioners in the opinion by the Florida Supreme Court. They were aware of that element of the case long before it was decided by the Florida Supreme Court. In the trial court on March 3, 1941, Citrus Patents Co., filed motion to dismiss the bill of complaint. On the same date Louisville Drying Machinery Co., filed a similar motion. Grounds 8 and 11 of each motion touch upon this phase of the case (R. 37-39).

On August 18, 1942, respondents herein filed their assignments of errors with the trial court (R. 33). Assignments 4, 5 and 6 very clearly refer to the scope of the employment contract.

This court will observe from the record (R. 40) that the foregoing motions to dismiss were included in the transcript at the direction of petitioners herein—and yet,

the court will find no cross-assignments of errors by said petitioners, although said motions to dismiss were denied by the Chancellor (R. 39).

It seems obvious from the record and from petitioners' own argument that they have not been denied due process of law. They were present in a court of competent jurisdiction; they participated in the taking of testimony on the very questions presented here; they had an opportunity to and were heard on the questions involving the scope of the contract of employment as well as notice thereof; they failed to make cross-assignments of error; and they do not show that the evidence on these issues would be different if the cause were retried.

CONCLUSION

We respectfully submit that the petition should be denied because

(1) The statutory period of time had elapsed before the petition was filed;

(2) The judgment is not final and complete so as to give this court jurisdiction;

(3) A federal right is assumed where none exists;

(4) Petitioners have had their day in court and have not been denied due process of law.

Respectfully submitted,

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